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FILED
DISTRICT COURT OF GUAM

AUG 15 2007

JEANNE G. QUINATA
Clerk of Court

6 Attorneys for Plaintiff-Intervenors,
7 *Jennifer Holbrook, Rosemarie*
8 *Taimanglo and Vivienne Villanueva*

9 IN THE DISTRICT COURT OF GUAM

10 U.S. EQUAL EMPLOYMENT)
11 OPPORTUNITY COMMISSION,)

12 Plaintiff,)

13 vs.)

14 LEO PALACE RESORT,)

15 Defendant.)

16 JENNIFER HOLBROOK,)
17 VIVIENE VILLANUEVA and)
18 ROSEMARIE TAIMANGLO,)

19 Plaintiff-Intervenors,)

20 vs.)

21 MDI GUAM CORPORATION dba LEO)
22 PALACE RESORT MANENGGON HILLS)
23 and DOES 1 through 10,)

Defendant.)

CIVIL CASE NO. 06-00028

**PLAINTIFF-INTERVENOR'S
OPPOSITION TO DEFENDANT'S
MOTION TO COMPEL TESTIMONY
AND PRODUCTION OF DOCUMENTS;
MOTION TO EXTEND DISCOVERY
COMPLETION DEADLINE; AND
MOTION FOR INDEPENDENT
MEDICAL EXAMINATION**

Hearing date: August 29, 2007

Hearing time: 1:30 p.m.

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ORIGINAL

1 Defendant MDI Guam Corporation dba Leo Palace Resort Manenggon Hills ("Leo Palace")
2 has moved to compel the production of Plaintiff-Intervenor's psychotherapy records and
3 psychotherapist's notes used in the treatment of the Plaintiff-Intervenors. The treatment records and
4 notes are requested without limitation and apply to any treatment received by the Plaintiff-
5 Intervenors from their therapists. Leo Palace also seeks to compel the testimony of the therapists
6 regarding the treatment and diagnosis of Plaintiff-Intervenors. In the event that the Court should
7 Order the relief requested by Leo Palace and Plaintiff-Intervenors or their therapists fail to comply,
8 Leo Palace asserts that Plaintiff-Intervenors' claims for emotional distress should be dismissed.
9 Finally, Leo Palace requests that the discovery deadline be extended so that Leo Palace could obtain
10 the therapists's records and notes "if so Ordered by the Court", and redepose the therapists and retain
11 a medical expert. Plaintiff-Intervenors object.

12 **I. LEGAL ARGUMENT**

13 **A. *Discovery of Plaintiff-Intervenors' Psychotherapy Records and Notes.***

14 Leo Palace argues that because Plaintiff-Intervenors have asserted claims of emotional
15 distress they are entitled to Plaintiff-Intervenors' entire medical history for psychotherapy treatment
16 obtained from Lilli Perez-Iyechad, PhD, RPT-S and Tom Babauta, MSW, QCSW (collectively the
17 "Therapists"). Leo Palace in discovery requested the psychotherapy medical records of the Plaintiff-
18 Intervenors and also requested that the Plaintiff-Intervenors execute waivers pursuant to the Federal
19 Health Insurance Portability and Accountability Act ("HIPAA"). The waivers were executed by the
20 Plaintiff-Intervenors and the undersigned requested the records from the Therapists in a letter
21 attached as Exhibit "1" to Thomas L. Roberts' Declaration, filed contemporaneously with Leo
22 Palace's Motion. The undersigned never received the requested records or notes.

23 Leo Palace argues that the records are relevant and cited opinions in various jurisdictions

1 outside of Guam for the proposition that the records and notes are discoverable. Plaintiff-Intervenors
2 executed HIPAA waivers and are not opposed to the release of their psychotherapy records and notes
3 which directly apply to the treatment they received as a result of being subjected to unlawful
4 discrimination and unlawful employment practices at the hands of Leo Palace. However, Leo Palace
5 wants any and all records and notes relating to psychotherapy care received by Plaintiff-Intervenors.
6 Notwithstanding the waivers, in March 2007 the therapists refused to provide the records and notes
7 to Leo Palace and to the Plaintiff-Intervenors' counsel. Instead they provided treatment summaries
8 and Defendant was provided copies of those summaries.

9 In July 2007, Defendant subpoenaed the therapists' records and notes but did not receive any
10 documents in response to the Subpoena. At their depositions last month, the Therapists refused to
11 provide any treatment testimony regarding the treatments they provided to the Plaintiff-Intervenors
12 or testimony on the notes and records that they kept in providing those treatments. They asserted
13 that the Plaintiff-Intervenors had recently rescinded their previously executed HIPAA waivers on or
14 about the day which the Therapists were to respond to Leo Palace's Subpoena for production of such
15 records and notes. They also stated that as psychotherapists they are under no obligation to do so
16 under the HIPAA statutes and regulations. In addition, the Therapists stated to the undersigned that
17 disclosure of the conversations, records and notes would cause the Plaintiff-Intervenors
18 embarrassment and harm and caused them to be further victimized. The Therapists limited their
19 deposition testimony to the treatment summaries that were previously provided.

20 Notwithstanding the cases cited by Leo Palace, there are cases which take a very direct and
21 opposite view on the discovery of psychotherapy records and notes. The United States Supreme
22 Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996) recognized, pursuant to Rule 501 of the Federal
23 Rules of Evidence that, an absolute privilege for confidential communications between the patient

1 and his psychotherapists during the course of treatment. In that case, the administrator for the Estate
2 of Ricky Allen was attempting to get the psychotherapist's records and notes of an off-duty police
3 officer who had shot and killed Allen. The Supreme Court stated that Rule 501 of the Federal Rules
4 of Evidence is a matter of evolutionary development of testimonial privilege. In *Jaffee*, the Court
5 was confronted with the question of whether a privilege protecting confidential communications
6 between a psychotherapist and her patient promotes sufficiently important interest to outweigh the
7 need for probative evidence. The court noted that the privilege is rooted and the imperative need for
8 confidence and trust. Effective psychotherapy treatment "depends upon an atmosphere of confidence
9 and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions,
10 memories, and fears. Because of the sensitive nature of the problems for which individuals consult
11 psychotherapists, disclosure of confidential communications made during counseling sessions may
12 cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede
13 development of the confidential relationship necessary for successful treatment." *Id.* at P. 10.

14 The court went on to say that "the psychotherapist privilege serves the public interest by
15 facilitating the provision of appropriate treatment for individuals suffering the effects of a mental
16 or emotional problem. The mental health of our citizenry, no less than its physical health, is a public
17 good of transcendent importance." *Jaffee* at P. 11. The court also found that the psychotherapist's
18 privilege not only covers confidential communications made to licensed psychiatrist and
19 psychologists but also to confidential communications made to licensed social workers made in the
20 course of psychotherapy. *Id.* at page 15. The Court in further discussing the privilege stated,
21 "making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative
22 importance of the patient's interest in privacy and the evidentiary need for disclosure would
23 eviscerate the effectiveness of the privilege. As we explained in *Upjohn Company v. United States*,

1 449 U.S. 383 (1981), if the purpose of the privilege is to be served, the participants in the
2 confidential conversations “must be able to predict with some degree of certainty whether particular
3 discussions would be protected. An uncertain privilege, or one which purports to be certain but
4 result in widely varying applications by the court, is little better than no privilege at all.” *Id.* at P.
5 17-18.

6 The Plaintiff-Intervenors are asserting claims for emotional distress but have not alleged any
7 grave particular harm they have suffered. In *Kunstler v. City of New York* 2006 WL 2516625, the
8 court reviewed the Defendant’s Motion to Compel Medical Disclosures including mental health
9 treatment records. In that case, Plaintiffs had not waived their privilege and were refusing to disclose
10 the requested information. “If the plaintiff contends that he has suffered a serious psychological
11 injury-that is, the inducement or aggravation of a diagnosable dysfunction or equivalent injury-he
12 will typically be deemed to have waived the privilege. Citations omitted. If, as is more common,
13 the Plaintiff seeks compensation for less acute forms of distress-frequently referred to as “garden
14 variety” emotional distress claims-the courts have not provided a consistent response to the argument
15 that such a demand for relief triggers a waiver, although most have rejected the notion of an
16 automatic waiver.” *Id.* at P. 7.

17 In our case, the Plaintiff-Intervenors executed a wavier and do not object to the disclosures
18 of treatment records or notes that were a result of the care they received for the unlawful treatment
19 they endured at the hands of the Defendant. However, in this case the Defendant is seeking any and
20 all records and notes.

21 The Court in *Kunstler*, quoting *United States v. Brizerian*, 926 F.2d 1285 (2nd Cir. 1991)
22 stated “to take a prototypical example, if a patient is a victim of a defendant’s misconduct, and she
23 asserts that she suffered emotional distress as a result, she may well be seeking compensation for

1 nothing more than the distress that any healthy, well adjusted person would likely feel as a result of
2 being so victimized.” In such a circumstance, the fact that the plaintiff is in treatment for the
3 condition unrelated to the distress that was triggered by the misconduct does not, by itself, provide
4 a basis for suggesting either that the treatment is an issue as a result of the plaintiff’s claim or that
5 access to treatment records is in any sense vital or even significant for evaluating such a claim.

6 Plaintiff-Intervenors have all been deposed and have answered all questions asked of them
7 relative to the treatment they received by their therapists. Plaintiff-Intervenors have no objection to
8 the disclosure of their treatment records and notes for the treatment related to the unlawful
9 employment actions of the Defendant but they do object to records and notes relevant to treatment
10 they have received related to other psychotherapy matters. The therapists refused to disclose any of
11 the records of the Plaintiff-Intervenors arguing that such disclosure would further victimize the
12 Plaintiff-Intervenors and jeopardize the psychotherapist-patient relationship that they maintain with
13 the Plaintiff-Intervenors.

14 Rule 26(c) of the Federal Rules of Civil Procedure authorized the Court, for good cause
15 shown,

16 ...[to] make any order which justice requires to protect a party or person from
17 annoyance, embarrassment, oppression or undue burden or expense, including one
18 or more of the following... (4) that certain matters not be inquired into, or that the
19 scope of the disclosure or discovery be limited to certain matters. The Court has
20 brought discretion to tailor discovery to the needs of the case and the interest of the
21 discovered party. *Laxalt v. McClatchy*, 809 F.2d 885 (D.C. Cir. 1987).

22 The court, in its discretion, is authorized by this subsection to fashion a set of limitations that
23 allows as much relevant information to be discovered as possible while preventing unnecessary
intrusions into the legitimate interest - including privacy and other confidentiality interest - that
might be harmed by the release of materials sought. *Pierson v. Miller*, 211 F.3d 57, 65 (3rd Cir.

2000). Thus, the Court has full discretion to modify or deny Defendant's Motion.

B. *Alternatively if the Court Orders Production of the Records it Should be Limited in Scope.*

In *Doe v. Chula Vista*, 196 F.R.D. 562 (S.D. Cal 1999), the court discussed that while production may be ordered the court did not suggest that the scope of discovery is unlimited. For example, one district court found that plaintiff had waived the psychotherapist-patient privilege by seeking emotional distress damages in her employment discrimination suit after she had been sexually assaulted at work. *Vasconcellos v. Cybex Int'l, Inc.*, 962 F.Supp. 701 (D.Md.1997). Nonetheless, the district court narrowed the scope of discovery. The court acknowledged that plaintiff had raised serious concerns that the disclosures would adversely affect her treatment by destroying the confidentiality of her relationship with her therapist. In light of the policy concerns behind the privilege, the court found that plaintiff had "a right to have discovery *limited to information that is directly relevant to the lawsuit.*" *Id.* at 709 (emphasis added). The court would prevent defendants from conducting a "fishing expedition" and would limit the scope of inquiry to whether, and to what extent, the alleged misconduct caused plaintiff to suffer emotional harm. *Id.* Moreover, the court agreed that the scope of discovery into this sensitive area should be limited and confined to that information that is essential to a fair trial.

In the present matter, Defendants have taken an "all or nothing" approach to this discovery dispute. Either Plaintiff-Intervenors produce all of their records or dismiss their emotional distress claims. That position does not respect the psychotherapist-patient privilege nor does it advance the resolution of this matter. Plaintiff-Intervenors contend that this request should be narrowly tailored to the particular area of Plaintiff-Intervenors emotional health. These restrictions should ensure that Plaintiff-Intervenors' privacy interests are not unduly burdened by the litigation that was brought

1 to vindicate their legal rights. As such, if the court orders production of these records, then the order
2 should be limited to information that is directly relevant to the lawsuit.

3 **II. MOTION TO DISMISS/EMOTIONAL DISTRESS CLAIMS.**

4 Plaintiff-Intervenors oppose Defendant's Motion to Dismiss/Emotional Distress Claims and
5 adopt the opposition filed by the Equal Employment Opportunity Commission.

6 **III. DEFENDANT'S MOTION TO EXTEND DISCOVERY
7 COMPLETION DEADLINE.**

8 Plaintiff-Intervenors oppose the Defendant's Motion to Extend Discovery Completion
9 Deadline to permit the Defendant time to designate a rebuttal medical expert. Defendant does not
10 substantiate good cause for the extension of the deadline and Plaintiff-Intervenors adopt the
11 opposition filed by the Equal Employment Opportunity Commission.

12 **IV. DEFENDANT'S MOTION FOR AN INDEPENDENT
13 MEDICAL EXAMINATION OF THE PLAINTIFF-
INTERVENORS.**

14 Plaintiff-Intervenors object to Defendant's Motion for an Independent Medical Examination
15 and adopt the arguments of the Equal Employment Opportunity Commission. In addition, the
16 Defendant is required to demonstrate good cause for an independent mental health examination of
17 the Plaintiff-Intervenors. Defendant argues that by placing their mental condition at issue, the
18 Plaintiff-Intervenors have waived their psychotherapists-patient privilege. As outlined above, there
19 is great dispute as to whether or not such a waiver exists. The Supreme Court however, has made
20 it clear that the psychotherapist-patient privilege is absolute.

21 In this case, the Defendant had the opportunity to conduct a full and complete deposition of
22 the Plaintiff-Intervenors and received answer to all of its questions. The Plaintiff-Intervenors did
23 not oppose the disclosure of the treatment notes and records for the care they received related to their

1 Leo Palace employment. Defendant has already received the treatment summaries from the
2 therapists. The fact that the Plaintiff-Intervenors claim emotional distress damages does not, in and
3 of itself, automatically allow an independent medical examination pursuant to F.R.C.P. Rule 35(a).
4 Defendant states that "Plaintiff-Intervenors only went to see the therapists because their attorney
5 suggested it." Defendant further states "Plaintiff-Intervenors emotional distress claims have always
6 been suspicious." Such self-serving statements do not constitute good cause for an independent
7 medical examination and Defendant has failed to articulate why or how such claims are suspicious.
8 In stating that the emotional distress claims of Plaintiff-Intervenors are suspicious, Defendant ignores
9 the allegations and evidentiary testimony that Plaintiff-Intervenors were subjected to a hostile work
10 environment and unlawful conduct for more than two (2) months. Thus, in the absence of good
11 cause, Defendant's Motion should be denied.

12 **V. CONCLUSION.**

13 Plaintiff-Intervenors object to Plaintiff's Motions filed herein. For the reasons set forth
14 above, Plaintiff-Intervenors respectfully request that all of Defendant's Motion's be denied.

15 *Respectfully submitted* this 15th day of August, 2007.

16 **TEKER, TORRES & TEKER, P.C.**

17
18 By: 

PHILLIP TORRES, ESQ.

19 Attorneys for Plaintiff-Intervenors,

Jennifer Holbrook, Rosemarie

Taimanglo and Vivienne Villanueva

1 **CERTIFICATE OF SERVICE**

2 I, Phillip Torres, Esq., declare as follows:

3 1. I am over the age of majority and am competent to testify regarding the matters stated
4 herein.

5 2. I hereby certify that on August 15, 2007, Plaintiff-Intervenors' Opposition to
6 Defendant's Motion to Compel Testimony and Production of Documents; Motion to Extend
7 Discovery Completion Deadline; and Motion for Independent Medical Examination was served by
8 hand delivery on Defendant's counsel, DOOLEY ROBERTS & FOWLER, LLP, Suite 201, Orlean
9 Pacific Plaza, 865 South Marine Drive, Tamuning, Guam 96911.

10 I declare under the penalty of perjury under the laws of the United States of America that the
11 foregoing is true and correct.

12 DATED this 15th day of August, 2007.

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14 
15 PHILLIP TORRES

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